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No. 82-63.

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

CITY OF REVERE,
PETITIONER,

v.

MASSACHUSETTS GENERAL HOSPITAL,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief for Petitioner.

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Question Presented.

Does a municipality have a constitutional duty, arising under the Eighth or Fourteenth Amendments, to pay the medical expenses of a felony suspect injured while being apprehended by the police?

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Opinion Below.

The opinion of the Supreme Judicial Court, dated April 12, 1982, is reported at 385 Mass. 772, 434 N.E.2d 185 (1982), and appears in the joint appendix (hereafter "A.") at 22-30.

Jurisdiction.

The Supreme Judicial Court issued its opinion on April 12, 1982 and issued its order for judgment to the trial court on the same date (A. 21). This Court granted certiorari on October 4, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(3).

Constitutional Provisions Involved.

The Eighth Amendment to the United States Constitution provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part: "No State . . . shall deprive any person of life, liberty, or property, without due process of law . . ."

Statement of the Case.

Petitioner ("Revere") seeks review of the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts holding Revere liable to pay for the medical expenses of a felony suspect injured during the course of an arrest effected by its police force. According to the Supreme Judicial Court, Revere's obligation to pay respondent Massachusetts General Hospital ("MGH") could not be implied from the common law or imposed by statute. Rather, the Supreme Judicial Court held that the Eighth Amendment to the United States Constitution required Revere to reimburse MGH for the costs of the emergency medical treatment.

The pertinent facts are not in dispute: On September 20, 1978, Revere police officers responded to a reported breaking and entering at a dwelling house in Revere (A. 13). At the scene, they observed one Patrick M. Kivlin ("Kivlin") with a suitcase and a pillowcase and they sought to detain him. Kivlin tried to run away and, after repeated warnings, and then a warning shot, a police officer shot him (A. 13). To secure treatment for Kivlin, Revere Police called the Nordstrum Ambulance Service, a private ambulance service. The ambulance took Kivlin to the emergency room at MGH where he was admitted for treatment of his gunshot wound. A Revere police officer accompanied Kivlin in the ambulance to MGH (A. 13). Kivlin was hospitalized at MGH from September 20 to September 29, 1978 (A. 14). MGH's charges for its treatment of Kivlin for this period were seven thousand, nine hundred and forty-eight dollars and fifty cents ($7,948.50) (A. 9).

On September 26, 1978, while Kivlin was still hospitalized, Revere police obtained a warrant for his arrest from the Chelsea District Court, the local court with appropriate jurisdiction (A. 14). Upon Kivlin's release from MGH on September 29, 1978, Revere police served the warrant and brought him to the Chelsea District Court for his arraignment. At the arraignment, the court granted Kivlin a continuance until December 1, 1978, and released him on personal recognizance (A. 14). Had Kivlin not been released on personal recognizance, or had he been unable to raise bail, he would have been sent to the Charles Street House of Correction in the city of Boston, or another like facility outside Revere. Revere has no jail or similar custodial institution within its city limits or under its control (A. 14).

On October 18, 1978, MGH sent a bill for services rendered in the treatment of Kivlin to the Chief of the Revere Police Department. The Chief immediately responded to MGH with a letter denying any responsibility for the expenses (A. 14).

On October 27, 1978, Kivlin was admitted to MGH for new treatment, including surgery (A. 10). Kivlin remained a patient at MGH until November 10, 1978, when he was discharged. MGH's fees for Kivlin's second hospitalization were five thousand, three hundred and sixty dollars and forty-one cents ($5,360.41) (A. 10). The record does not reflect that MGH made any effort at any time to collect its fees from Kivlin. Similarly, there is no indication in the record that Kivlin was indigent or otherwise unable to pay for the medical treatment (A. 7-15).

On January 17, 1979, MGH commenced this action against Revere in the Boston Municipal Court to recover the cost of the medical services rendered to Kivlin. Revere answered and caused the case to be removed to the Superior Court for Suffolk County, a trial court of the Commonwealth with more general jurisdiction (A. 1, 3-5). After completion of the pleadings, MGH moved for summary judgment, Mass.R.Civ.P. 56, and the motion was referred to a special master for hearing (A. 6). After hearing, the special master wrote a report to the superior court, recommending that judgment enter for Revere since, according to the special master, there was no common law, statutory or constitutional basis for a recovery against Revere (A. 16-20). The trial judge, after reviewing the report of the special master and the papers on file in the case, agreed with the conclusions of the special master, entered summary judgment for Revere and dismissed MGH's complaint (A. 1-2). After the entry of judgment for Revere, MGH duly filed its appeal to the Appeals Court, and after entry of the appeal in the Appeals Court, the Supreme Judicial Court transferred the case to its docket on its own motion (A. 24).

The Supreme Judicial Court, after hearing, reversed the judgment of the trial court. Although MGH argued that its right to recover was grounded both in state law and the Constitution, the Supreme Judicial Court rejected all state law

claims. Indeed, the court held that it would be *illegal* under state law to imply any contract between MGH and Revere (A. 24-26). Nevertheless, the court held that the Eighth Amendment to the United States Constitution mandated that Revere reimburse MGH. As the court stated, 385 Mass. at 774, 434 N.E.2d at 186, A. 24:

> While there is no contractual basis for recovery, we hold that the constitutional prohibition against cruel and unusual punishment, embodied in the Eighth Amendment to the United States Constitution, requires that Revere be liable to the hospital for the medical services rendered to Kivlin during his first stay at the hospital . . .

In its decision, the Supreme Judicial Court relied on *Estelle* v. *Gamble*, 429 U.S. 97 (1976), as the authority for Revere's liability. According to the court, *Estelle's* prohibition against "deliberate indifference" to the medical needs of prisoners created a legal duty on the part of Revere to supply the suspect with "necessary medical care" (A. 26). But more than simply an obligation to provide the suspect with access to services, this Eighth Amendment duty, according to the Supreme Judicial Court, required Revere to reimburse MGH for the services it had already provided. Under the court's holding, Revere's Eighth Amendment duty to pay was unconditional; Revere was obligated to pay whether or not Kivlin was indigent and whether or not other parties or other resources were available to reimburse MGH (A. 29).

Even Revere's contention that *Estelle* was limited to prisoners in jail or other institutional setting was flatly rejected

by the Supreme Judicial Court. As the court stated, 385 Mass. at 777, 434 N.E.2d at 188, A. 27:

> It is not the fact of incarceration, however, that triggers the protections afforded by the Eighth Amendment. Rather, it is the suspect's loss of freedom when he "cannot by reason of the deprivation of his liberty, care for himself," . . . that requires the government to begin to provide medical care. (Citations omitted.)

Whether the Eighth Amendment creates, under these circumstances, an absolute duty on the part of a municipality to reimburse the health care provider for the costs of emergency medical treatment is the central issue posed by this case.

Summary of Argument.

The Supreme Judicial Court's opinion sets forth the proposition that, although prohibited under state law, Revere was obligated under the Eighth Amendment to pay MGH for the emergency treatment rendered to Kivlin, the injured suspect. This holding is erroneous since the Eighth Amendment prohibition against "cruel and unusual punishments" has no application to a person such as Kivlin, not yet convicted of any crime. If the Eighth Amendment applied to Kivlin, however, it still would not require Revere to reimburse MGH for the costs of Kivlin's emergency treatment.

The Eighth Amendment prohibition against cruel and unusual punishments solely concerns the state's power to punish. Thus, the Eighth Amendment has been applied to limit the kinds of punishments imposed, to proscribe excessive

punishments and to restrict the type of activity that may be made criminal. The state has no power to punish, however, until it has secured a "formal adjudication of guilt in accordance with due process of law." *Ingraham* v. *Wright*, 430 U.S. 651, 671 (1977). Therefore, the Eighth Amendment prohibition against "cruel and unusual punishments" cannot be applied to a criminal suspect like Kivlin who has not yet been convicted of any crime.

Even if the Eighth Amendment protection could somehow be extended to cover Kivlin, it would not require Revere to pay MGH for the costs of Kivlin's care. Under the rule of *Estelle* v. *Gamble*, 429 U.S. 97 (1976), the Eighth Amendment proscribes "deliberate indifference to serious medical needs of prisoners." Although the rule of *Estelle* necessarily imposes on government an affirmative obligation to provide certain medical care, this affirmative duty cannot exist outside of an institutional setting. In a government institution, the individual is "wholly dependent" on the state to provide for basic needs, including medical care. *Youngberg* v. *Romeo*, ___ U.S. ___, ___, 102 S.Ct. 2452, 2459 (1982). An injured suspect such as Kivlin is not totally dependent on the state, as he has not been institutionalized, and thereby deprived of his freedom. Rather, he is in the same position as any other private citizen injured and in need of emergency medical care. The Eighth Amendment does not require Revere to pay for the emergency medical treatment rendered to its citizens; neither does it obligate Revere to pay MGH for Kivlin's emergency care.

In asserting its claim based on the Eighth Amendment, MGH relied exclusively on the constitutional rights of its patient Kivlin. As a matter of sound discretion, this Court should decline to grant MGH standing to assert the constitutional rights of third-parties not before the Court.

Based on the record in this case, the substantive right of Kivlin that MGH asserts — the right to emergency medical care — was in no real jeopardy. Kivlin was given all the medical care that was required, as MGH was obligated to do under state law. If the rights of criminal suspects such as Kivlin are subject to future jeopardy, it will only be because hospitals such as MGH, here the "champion" of Kivlin's rights, will refuse to render emergency care. Even if this remote possibility occurs, the rights of the criminal suspect can be fully protected by a personal action brought by the suspect. In short, there is no compelling reason to deviate from the accepted rule of only permitting parties to assert their own constitutional rights and not the rights of others.

If this Court accords MGH standing to assert Kivlin's rights, the constitutional provision to be applied in this case is the Due Process Clause of the Fourteenth Amendment, not the Eighth Amendment prohibition against cruel and unusual punishments. Properly applied, the Due Process Clause does not require Revere to reimburse MGH for the cost of Kivlin's treatment.

The Due Process Clause creates a limitation on the exercise of governmental power. But because Revere could not deprive Kivlin of his liberty to seek emergency medical care does not mean that the Due Process Clause requires Revere to pay for the treatment rendered. The Due Process Clause simply does not require states or municipalities to provide substantive services for its citizens. Whether Revere is obligated to reimburse MGH is a matter of state, not constitutional law.

Argument.

I. The Eighth Amendment Prohibition Against Cruel and Unusual Punishments does Not Require Revere to Reimburse MGH for the Costs of Emergency Medical Treatment.

In its decision, the Supreme Judicial Court relies on the Eighth Amendment to find Revere liable to MGH for the medical treatment rendered to Kivlin. The court expressly holds that the Eighth Amendment "requires that Revere be liable to the hospital." 385 Mass. at 774, 434 N.E.2d at 186, A. 24. This remarkable holding, mandating payment as a direct result of the Eighth Amendment, ignores important principles enunciated in prior opinions of this Court and distorts the meaning and purpose of the Eighth Amendment.

This Court has repeatedly emphasized that the Eighth Amendment simply does not apply to factual circumstances such as those in this case. *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977); *Bell* v. *Wolfish*, 441 U.S. 520, 535 (1979). As prior decisions of this Court make clear, the historical background of the Eighth Amendment relates to the imposition of criminal sanctions and the desire to prevent excessive or barbarous punishments. See *Gregg* v. *Georgia*, 428 U.S. 153, 168-173 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.); *Furman* v. *Georgia*, 408 U.S. 238, 316-328 (1972) (Marshall, J., concurring). Similarly, judicial interpretations of the Eighth Amendment have dealt with criminal punishments by limiting the kind of punishments imposed,[1] proscribing grossly excessive punishments,[2] and by placing substantive limits upon

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[1] See *Trop* v. *Dulles*, 356 U.S. 86 (1958) (expatriation for desertion); *Estelle* v. *Gamble*, *supra*, (prison officials' imposing "punishment" by deliberate indifference to prisoner's serious medical needs).

[2] See *Weems* v. *United States*, 217 U.S. 349 (1910); *Hutto* v. *Finney*, 437 U.S. 678 (1978).

activity that may be made criminal.[3] See *Ingraham*, *supra*, at 666-668 and cases cited.

Therefore, if a case falls outside of the criminal process and the imposition of criminal sanctions, the Eighth Amendment prohibition against "cruel and unusual punishments" is inapplicable. As this Court stated in *Ingraham*, *supra*, at 617-672, n.40:

> Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment. (Citations omitted.)

In this case, the Eighth Amendment has no application whatsoever to one in Kivlin's situation who was injured while being apprehended by the police. *Ingraham*, *supra*. See also *Bell* v. *Wolfish*, *supra*, at 579 (Stevens, J. dissenting). Neither the Commonwealth nor Revere had "secured a formal adjudication of guilt" against Kivlin at the time the medical treatment was rendered (A. 16). Indeed, Kivlin's initial arraignment did not take place until after he was discharged from MGH (A. 16). Likewise, Kivlin could in no sense be considered a "prisoner." After his arraignment, he was released on his personal recognizance (A. 16). Even if the Commonwealth or Revere had demanded that Kivlin be held in custody

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[3] See *Robinson* v. *California*, 370 U.S. 660 (1962).

pending arraignment, he would have been sent to the Charles Street Jail in Boston or a similar facility outside Revere, since Revere has no jails within its boundaries and maintains no detention facilities (A. 16). Under these circumstances, Kivlin is simply not eligible — and has no need — for any Eighth Amendment protection.

Even if the umbrella of Eighth Amendment protection could somehow be broadened to cover one in Kivlin's situation, it still would not require Revere to reimburse MGH for the cost of Kivlin's medical treatment. As previously stated, the Supreme Judicial Court implied a duty to pay from the rule of *Estelle* v. *Gamble, supra*. Yet the extension of *Estelle's* proscription of "deliberate indifference to serious medical needs of prisoners" to requiring payment for medical treatment can only apply, if at all, in the context of a prison or similar custodial facility. An affirmative duty to provide medical care, along with food, shelter, and clothing, can only arise in an institutional setting, where the individual is "wholly dependent" on the imprisoning authority. *Youngberg* v. *Romeo*, ___ U.S. ___, ___, 102 S.Ct. 2452, 2459 (1982); *Estelle, supra* at 103. Outside of these institutions, government has no affirmative obligation to provide its citizens medical care, or other essentials of support. See *Maher* v. *Roe*, 432 U.S. 464, 469 (1977) ("The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents"); *Lavine* v. *Milne*, 424 U.S. 577, 584 n.9 (1976) ("Welfare benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support"); *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972) (no constitutional guarantee of adequate housing). Even in the institutional setting, the constitution mandates no specific ways of meeting basic needs. Instead, administrators traditionally enjoy broad

discretion in devising plans to meet these affirmative obligations. See *Bounds* v. *Smith*, 430 U.S. 817, 825, 830 (1977); *Hutto* v. *Finney*, 437 U.S. 678, 687 (1978).

A criminal suspect such as Kivlin, however, is in a different position from a prisoner committed to a correctional facility. Unlike the prisoner who must rely on prison authorities to meet his needs, a suspect has not been stripped of means, financial and otherwise, with which to secure and pay for necessary medical treatment. To the contrary, Kivlin demonstrated the resources at his disposal by returning to MGH after his arraignment and securing additional treatment, services that the hospital voluntarily administered (A. 10).

Revere does not contend that its police officers could deliberately withhold or delay treatment for Kivlin after he was injured. Rather, the police acted properly and responsibly in immediately calling an ambulance to secure necessary medical attention for Kivlin (A. 13). Kivlin's right not to be denied prompt access to medical treatment, however, simply cannot be equated with an obligation to pay for this treatment outside the context of a prison with inmates who "cannot by reason of the deprivation of . . . liberty, care for [themselves]." *Estelle, supra*, at 104, quoting *Spicer* v. *Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926).

As the prior decisions of this Court make clear, the Eighth Amendment provides persons convicted of crimes with essential protection against excessive punishment and onerous conditions of confinement. Notwithstanding the opinion of the Supreme Judicial Court, the Eighth Amendment does not provide any basis for holding Revere liable to reimburse MGH for the expenses of emergency medical treatment of an injured criminal suspect.

II. MGH has No Standing to Assert the Constitutional Rights of the Criminal Suspect as a Basis for Recovery Against Revere.

The Supreme Judicial Court determined that MGH had standing to raise Kivlin's Eighth Amendment claim since "standing to litigate constitutional issues is sometimes granted to persons asserting the rights of others, especially when it would be difficult for the person whose rights are asserted to litigate them."[4] Far from championing rights that would otherwise be difficult to protect, MGH was permitted to raise third-party rights subject to mere speculative or hypothetical danger. Therefore, the Supreme Judicial Court erred in permitting MGH to litigate in this case the rights of Kivlin, the injured criminal suspect.

This Court has often enunciated the principle that limitations on a litigant's right to raise third-party claims "stem from a salutary 'rule of self-restraint' designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative." *Craig* v. *Boren*, 429 U.S. 190, 193 (1976). This principle is designed to avoid unnecessary adjudications of constitutional rights, either because the rights are not truly threatened or the litigant is not an appropriate advocate of the rights in question. Both considerations militate against according MGH standing in this case.

At the outset, it is clear that in Massachusetts, through a combination of laws and policies, an injured suspect such as Kivlin will receive emergency medical attention regardless of whether municipalities provide reimbursement to hospitals. For example, all hospitals in Massachusetts with a certified

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[4] *Massachusetts General Hospital* v. *Revere*, 385 Mass. 772 at 777 n.7, 434 N.E.2d 185 at 188, A. 27, citing *Barrows* v. *Jackson*, 346 U.S. 249 (1953).

emergency unit are required by statute to provide emergency services to all requiring them, without discrimination on account of the source of payment or economic status. Mass. Gen. Laws c. 111, § 70E(k). Hospitals refusing to provide treatment under these circumstances would be subject by statute to malpractice liability. Mass. Gen. Laws c. 111, § 70E and c. 231, § 60B-E.

Similarly, public welfare statutes provide for financial assistance for needy persons requiring medical care. See Mass. Gen. Laws c. 118E. Federal regulations prescribe that hospitals that have received grants under the Hill-Burton Act, c. 958, § 601 *et seq.*, 60 Stat. 1041 (1946), codified at 42 U.S.C. § 291 (1976), must supply a reasonable amount of free care to indigents for at least 20 years, 42 U.S.C. § 291c(e), 42 C.F.R. § 124.503(a). Hospitals that have received or will receive aid under Title XVI of the Public Health Service Act must provide such care indefinitely. 42 U.S.C. 300o-3(b)(1)(J). Furthermore, any hospital assisted by either program is required to make emergency care available to all, regardless of ability to pay. 42 C.F.R. § 124.603(b)(1).[5]

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[5] These enactments reflect the policies adopted in other states imposing a duty on hospitals with emergency facilities to treat all people in need. *See e.g. Guerrero* v. *Copper Queen Hospital*, 112 Ariz. 104, 537 P.2d 1329 (1975); *Wilmington General Hospital* v. *Manlove*, 54 Del. 235, 174 A.2d 135 (1961); *Mercy Med. Ctr. of Oshkosh, Inc.* v. *Winnebago County*, 58 Wis.2d 260, 206 N.W.2d 198 (1973). *Dade Cty.* v. *Hospital Affiliates Intern.*, 378 So.2d 43 (Fla. App. 1979). Commentators have suggested that this judicially-recognized duty on hospitals to provide emergency care is now well-established. *See, e.g.* Dougherty & Dougherty, Moral Reconstruction in the Hospital: A Legal and Philosophical Perspective on Patient Rights, 14 *Creighton L. Rev.* 1409, 1410-11 (1981); Ficarra, The Hospital Emergency Room and the Law, 12 *Cal. W. L. Rev.*, 223, 236 (1976); G. Annas, *The Rights of Hospital Patients* 37 (1975). Finally, the standards promulgated by the Joint Commission on Accreditation of Hospitals, published in the Accreditation Manual for Hospitals, provide that: "Any individual who comes to the hospital for emergency medical evaluation or initial treatment shall

These laws and policies merely confirm the practices evidenced in this case. An emergency patient, such as Kivlin, will receive the care required regardless of the patient's ability to pay or the source of payment, including the availability of municipal reimbursement. At stake in this litigation, therefore, is nothing more than determining the source of "remuneration for professional services."[8]

Even if the suspect's right to emergency medical treatment could somehow be deemed to be in jeopardy, MGH should nonetheless be denied standing. For if these rights were truly endangered, the criminal suspect would be quite capable of bringing an action to vindicate the personal rights at stake.

That few bona-fide obstacles exist to a suspect's personal action can be seen by comparison with two prior cases that permitted the assertion of third-party rights, *Barrows* v. *Jackson*, 346 U.S. 249 (1953), relied on by the Supreme Judicial Court, and *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958). In *Barrows*, a seller of land subject to a racially restrictive covenant was permitted to assert the equal protection rights of third parties in defense to a damage action brought against the seller. The assertion of the rights of third parties in *Barrows* was essential to the protection of these rights. Had the seller been denied the ability to raise the equal protection claims of potential buyers, and had the civil action for damages produced the likely outcome of compliance with the restrictive covenant, it would have been virtually impossible for anyone to vindicate the fundamental rights involved.

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be properly assessed by qualified individuals and appropriate services shall be rendered within the defined capability of the hospital." Accreditation Manual for Hospitals, Joint Commission on Accreditation of Hospitals, at p. 23 (1981 ed.).

[8] *Singleton* v. *Wulff*, 428 U.S. 106, 129 (1976) (Powell, J., dissenting).

Similarly, in *N.A.A.C.P.* v. *Alabama*, *supra*, the N.A.A.C.P. was permitted to raise the associational rights of its members in resisting a court order to reveal its membership list. The assertion of the rights of third parties was deemed essential in *N.A.A.C.P.*, since "to require that [the rights] be claimed by the members themselves would result in nullification of the right at the very moment of its assertion." *Id.* at 459.

Suspects such as Kivlin face none of the difficulties addressed in *Barrows* and *N.A.A.C.P.* If MGH is not permitted to champion their alleged rights to emergency medical treatment, they do not face dilution of their rights. See Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 432 (1974). There is simply no reason to conclude that, absent reimbursement from the municipality that effects the arrest, hospitals such as MGH will depart from established practice and will cease rendering emergency service to those in need of care, including injured suspects.

Even if hospitals such as MGH should decide that the existing laws, policies and customs in Massachusetts do not compel them to treat injured suspects in reliance on existing sources of reimbursement, the injured suspect faces no obstacles to the vindication of any rights to emergency medical care. If the arresting officers deprive the suspect of liberty interests in not securing treatment, the suspect may bring an action in state or federal court pursuant to 42 U.S.C. § 1983. Likewise, if the hospital refuses to render appropriate treatment, the suspect may bring an action for malpractice under Mass. Gen. Laws c. 231, § 60B-E.

Under these circumstances, it would be appropriate for this Court to defer consideration of an injured suspect's right to medical care until an actual case is presented wherein these rights are threatened. This case clearly does not fall within this class and the determination of the Supreme Judicial Court

that MGH had standing to assert the rights of an injured suspect is erroneous and ought to be reversed.

III. Revere has No Constitutional Duty to Reimburse MGH for the Expenses of Emergency Medical Treatment.

At the core of the Supreme Judicial Court's decision was the concept that MGH had a right to reimbursement arising directly from the constitution. According to the Supreme Judicial Court, this right to reimbursement could not be derived from an implied contract based on a constitutional duty, as no implied contract could be recognized under Massachusetts law. Rather, MGH's right to reimbursement was viewed as an essential component of the substantive constitutional right. See 385 Mass. at 774; 434 N.E.2d at 186, A. 24. Although the Supreme Judicial Court clearly erred in relying on the Eighth Amendment,[7] it would also be erroneous to reach the same result under the applicable constitutional provision, the Due Process Clause of the Fourteenth Amendment.

As previously stated, the rights of persons in official custody prior to criminal conviction are not governed by the Eighth Amendment, but by the Due Process Clause of the Fourteenth Amendment. *Ingraham* v. *Wright*, 430 U.S. 651, 671 (1977). The substantive rights that due process protects are the "liberty" interests of the individual. See *Youngberg* v. *Romeo*, ___ U.S. ___, ___, 102 S.Ct. 2452, 2458 (1982). Analysis of the "liberty" interests of the suspect in this case does not lead to the conclusion that Revere must reimburse MGH for the costs of emergency medical care.

The Due Process Clause creates a limitation on the exercise of governmental power. Thus, Revere police could not delib-

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[7] See Part I, *supra*.

erately withhold or delay treatment for Kivlin simply because he was suspected of a crime. Similarly, merely because Kivlin was a criminal suspect could not deprive him of the liberty to get necessary medical attention for his injuries. Like any private citizen in need of emergency treatment, Kivlin must be provided with access to appropriate care. Any action on the part of Revere inconsistent with providing Kivlin prompt access to emergency medical care could therefore conceivably violate Kivlin's bona-fide "liberty" interests. But like a private citizen in an emergency, the "liberty" to seek care carries with it no guarantee that government will pay for the services rendered.

This Court has recognized the difference between this restraint on the exercise of governmental power and a provision requiring the allotment and expenditure of municipal funds. As stated in *Harris* v. *McRae*, 448 U.S. 297, 317-318 (1980):

> [T]he liberty protected by the Due Process Clause . . . does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives, or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent women even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. (Citations and footnotes omitted.)

Despite pressures to do so, this Court has resisted other efforts to transform the Due Process Clause into the key that unlocks the public treasury. As articulated most recently in *Youngberg* v. *Romeo*, ___ U.S. ___, ___, 102 S.Ct. 2452, 2459 (1982): "As a general matter, a State is under no constitutional duty to provide substantive services for those within its borders." See also *Maher* v. *Roe*, 432 U.S. 464, 469 (1977) (medical treatment); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970) (welfare benefits); *Lavine* v. *Milne*, 424 U.S. 577, 584 (1976) (same); *Lindsey* v. *Normet*, 405 U.S. 56, 74 (1972) (no constitutional guarantee of adequate housing). Thus, while Revere may not deny an injured suspect, such as Kivlin, access to medical treatment, it is not therefore obliged, as a matter of constitutional law, to pay for the cost of the treatment rendered.

If an issue of payment does arise, it is appropriately treated as a matter of state or local law. The issues raised in this case have been so treated by courts around the country. For example, in *Trinity Hospital Association* v. *City of Minot*, 76 N.W.2d 916 (N.D. 1956), the Supreme Court of North Dakota, on facts virtually identical to those in this case, refused to hold the city of Minot liable. After reviewing the pertinent statutes of North Dakota, the court held that the theories of quantum meruit or implied contract could not be applied to the case.

The Supreme Court of Connecticut, in *Windham Commun. Mem. Hosp.* v. *City of Willimantic*, 166 Conn. 113, 348 A.2d 651 (1974), likewise found that a municipality was not liable for the medical expenses of an injured suspect. (See also *King County* v. *City of Seattle*, 70 Wash. 2d 988, 425 P.2d 887, 890 (1967) (Supreme Court of Washington held that a city was not liable to a county hospital for medical treatment rendered to a suspect injured by city police, since sheriff's only duty was to deliver the injured party to the hospital for treatment)).

Other state courts have ruled that the municipality must be held liable, but the basis of liability has been state statutory or common law. For example, in *Mt. Carmel Med. Center* v. *Bd. of Cty. Com'rs*, 1 Kan. App. Ct. 2d 374, 566 P.2d 384 (1977), the Court of Appeals of Kansas held that the hospital was entitled to payment from a county based upon Kansas law. As the *Mt. Carmel* court stated, 566 P.2d at 387:

> Both parties agree that in Kansas a sheriff has a duty to furnish medical attention to a prisoner in his custody who is in need thereof, at the county's expense if the prisoner is indigent and no other source of funds is available. This is clearly the law in Kansas.

(See also *Dodge City Med. Center* v. *Bd. of Cty. Com'rs*, 6 Kan. App. Ct. 2d 731, 634 P.2d 163 (1982); *Hospital Services Inc.* v. *Dumas*, 297 N.W.2d 320 (N.D. 1980); *Spicer* v. *Williamson*, 191 N.C. 487, 132 S.E. 291 (1926).

Elsewhere, decisions have been predicated on statutory enactments. Thus, in *City of Tulsa* v. *Sisler*, 285 P.2d 422 (Okl. 1955), municipal liability was based on a statute that expressly required officials to tend to the medical needs of prisoners in custody. See also *Lamar* v. *Board of Com'rs*, 4 Ind. App. 191, 30 N.E. 912 (1892).

Only one other state, Nebraska, has fashioned municipal liability based upon a constitutional duty. In *Lutheran Medical Center* v. *City of Omaha*, 204 Neb. 292, 281 N.W.2d 786 (1979), the Supreme Court of Nebraska held that the City of Omaha was liable for the cost of medical services provided to both a prisoner in the city jail and a criminal suspect not yet convicted. Yet even *Lutheran Medical Center* relied on the Constitution simply as establishing a duty to provide care; it

relied solely on state law to create the implied contract to provide for reimbursement to the hospital for the services rendered. See *Lutheran Medical Center, supra*, 204 Neb. at 296, 281 N.E.2d at 789. In short, the determination of how hospitals are to be paid for emergency treatment is an issue of state law to be decided by the states.[8]

The decision of the Supreme Judicial Court is unique in holding that a constitutional right of access to medical care includes a municipal duty to pay the hospital for the care provided. If permitted to stand, the decision of the Supreme Judicial Court will require that the Constitution displace the various state solutions, both legislative and judicial, to the problems posed by the fact pattern in this case. To demonstrate that the Constitution requires no such result, this Court should reverse the opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Conclusion.

The opinion of the Supreme Judicial Court grafted onto the Eighth Amendment limitation on the exercise of government's power to punish an affirmative funding obligation on the part of local government. This result clearly distorts the purpose and function of the Eighth Amendment as enunciated in the opinions of this Court. It further demonstrates that the rules against permitting parties to assert the rights of others not before the court are appropriate and ought to be invoked in this case to bar MGH's claim.

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[8] See pp. 13-14 and n.5, *supra*. The issue may be determined based upon the availability of governmental funding. For example, in Massachusetts, strict limits have been set on the power of municipalities to levy taxes and spend the revenues collected. See c. 580 of the Acts of 1980.

If permitted to stand, the Supreme Judicial Court's opinion will increase pressures to create entitlements to public funds resting on the Eighth Amendment and other constitutional provisions. To make clear that the Eighth and Fourteenth Amendments permit no such result, this Court should reverse the judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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